STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 29, 2003
v	No. 237793 Wayne Circuit Court
NICOLE L. MOORE, Defendant-Appellant.	LC No. 00-013489

Before: Meter, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

Defendant appeals by right from her convictions by a jury of possession with intent to deliver fifty or more but less than 225 grams of heroin, MCL 333.7401(2)(a)(iii), and possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv). The trial court sentenced her to ten to twenty years' imprisonment for the heroin conviction and to a concurrent term of one to twenty years' imprisonment for the cocaine conviction. We affirm.

In her first issue on appeal, defendant argues that the prosecutor committed misconduct requiring reversal. "We review claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial." *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Defendant identifies five specific areas of concern.

She first contends that the prosecutor improperly relied on evidence of other bad acts in violation of MRE 404 by eliciting from a witness that one of the vehicles confiscated from the home in which the drugs were found had an altered vehicle identification number. She argues that the prosecutor improperly failed to provide advance notice of her intention to use this "other acts" evidence as required by MRE 404(b) and improperly insinuated that the vehicle was stolen.

We cannot conclude that reversal is warranted. Indeed, even assuming, arguendo, that the prosecutor should not have elicited the information in question, defendant was not denied a fair trial as a result of the error. The discussion of the altered number was brief, and, significantly, the court ordered the offending answers struck from the record. No one testified that defendant actually possessed a stolen vehicle but merely that "something ha[d] been altered on [the] vehicle." Under the circumstances, the defendant was not denied her right to a fair and impartial trial. See *Watson, supra* at 586.

Second, defendant contends that the prosecutor erred during closing arguments by stating that defendant was faking her limp to elicit sympathy from the jury. Because there was no objection to this remark, we review this issue using a plain error analysis. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To obtain relief, defendant must demonstrate the existence of a clear or obvious error that affected the outcome of the case. *Id.* We find no such error. During trial, the prosecutor had questioned defendant about her limp, asking whether she had also limped the previous day. Defendant testified that she had indeed been limping the previous day. The jury was in a position to determine whether defendant had been limping previously or whether defendant may have been attempting to elicit sympathy. At any rate, we cannot conclude that the statement by the prosecutor affected the outcome of the case, given the evidence of defendant's guilt introduced during trial. Accordingly, reversal is unwarranted.[1] *Id.*

Third, defendant contends that the prosecutor erred during closing arguments by stating without evidentiary support that defendant matched the identification of the unnamed person mentioned in the search warrant. We find no error, however, because the officer in charge testified that defendant did indeed match the description in the search warrant. Accordingly, the prosecutor's argument was supported by the evidence introduced at trial.

Fourth, defendant contends that the prosecutor erred during closing arguments by mischaracterizing the testimony of a witness. We agree that the prosecutor erred in this instance. Indeed, contrary to the prosecutor's assertion, the witness in question did not testify that she had talked with defendant's mother about her proposed testimony. However, although the prosecutor made a misstatement, we cannot say that the brief mischaracterization of the witness' testimony deprived defendant of a fair and impartial trial. See *Watson, supra* at 586. Moreover, the trial court's instruction that the attorneys' arguments were not evidence was sufficient to cure any prejudice. See *People v Long*, 246 Mich App 582; 588; 633 NW2d 843 (2001).

Fifth, defendant contends that the prosecutor erred by giving "unsworn testimony" that defendant had been involved in prior drug sales.

During closing arguments, defense counsel argued:

> See, you gotta watch this kinda' situation, 'cause it's like bein' in the wrong place at the wrong time. Essentially, it's that. Because, see, this isn't a long investigation, where we've been watchin' Nicole Moore, and –
>
> MS. KETTLER [*prosecutor*]: (interposing) Objection. That is not in evidence. That may or may not be true.

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[1] Moreover, we note that defendant made several attempts to portray herself as a downtrodden victim during trial by making references to her own medical condition, her mother's ill health, and her father's recent death. She also claimed that the prosecutor was trying to "kill" her. The prosecutor did not commit plain error when she attempted to neutralize defendant's injection of inappropriate and irrelevant considerations into the trial. See *People v Delisle*, 202 Mich App 658, 671; 509 NW2d 885 (1994) (prosecutor can respond to pleas for sympathy).

> MR. EVANS [*defense counsel*]: Your Honor, this is closin' argument.
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> MS. KETTLER: That is not in evidence.
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> MR. EVANS: Well, they haven't talked about buyin' no drugs. They said they've never bought drugs from her.
>
> THE COURT: Overruled. Proceed.

The prosecutor responded as follows during rebuttal argument:

> Now, he wants to talk about, well, they didn't tell you about ever buying any drugs from the defendant. He's saying that because he knows that I can't introduce that here; whether that happened, or not. So, it's okay for him to talk about things that aren't in evidence, but –
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> MR. EVANS: (Interposing) Your Honor, then I object. Why is she goin' into then?
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> MS. KETTLER: Well, you brought it up, counsel.
>
> THE COURT: Overruled.
>
> MS. KETTLER: The fact is, you don't know whether that's happened, or not. That type of evidence was not admitted here. You don't know, or not. I'm just saying don't let him break the rules and say, "Oh, that never happened," because that's not what the evidence is. He is asking you to assume that. That's not what the evidence is.

The prosecutor made a similar argument with regard to whether the police had searched the address where defendant claimed she lived. This came in response to defendant's argument that the police must not have considered defendant to be a drug dealer because they did not search her home.

We find no error because the prosecutor's comments were a proper response to matters raised by the defense. See, generally, *People v McElhaney*, 215 Mich App 269, 284; 545 NW2d 18 (1996). Indeed, "[a] prosecutor's comments must be considered in light of the defense arguments." *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). Otherwise improper remarks may not require reversal if the remarks were made in response to defense counsel's arguments. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Reversal is unwarranted.[2]

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[2] We reject defendant's argument on appeal that the prosecutor's improper conduct in the aggregate denied defendant a fair trial. Indeed, any errors were slight and did not affect defendant's right to a fair trial.

In her second issue on appeal, defendant argues that the jury was exposed to extraneous information when two men in the courtroom engaged in certain unspecified disruptions during the trial. She argues that the court owed a duty to investigate whether the jury was influenced by the interruption. Because defendant did not object at trial, we review this issue using the plain error analysis from *Carines, supra* at 763-764. Defendant has not met her burden for relief. Indeed, when the prosecutor objected to the interruption and sought further inquiry into whether the jurors had been influenced, defense counsel assured the court that one of the men was a former client and that their presence had nothing to do with this case. Counsel specifically dissuaded the court from inquiring further into the interruption. Moreover, the trial court instructed the jury that two men had been removed for interrupting the proceedings and that they had no connection with the trial. Under these circumstances, no plain error requiring reversal is apparent.

Defendant additionally argues that her attorney rendered ineffective assistance of counsel by failing to request further inquiry into the matter. To establish ineffective assistance of counsel, a defendant must show that her counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and that, but for counsel's error or errors, it is reasonably probable that the outcome of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Id.* at 302. Here, because defendant failed to make a testimonial record in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review of this issue is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

We discern no basis for reversal. Whatever happened at trial, the prosecutor felt there was some form of prejudice to the prosecutor's case. Defense counsel apparently was not concerned with the effect of the interruption on defendant's case. Indeed, from the record, it appears that the interruption had no connection with defendant or this trial. Under the circumstances, defendant has not shown that his counsel acted unreasonably by failing to request a further inquiry into the matter or that counsel's actions in connection with the incident affected the outcome of the case. *Toma, supra* at 302-303.

Finally, defendant argues that the court erred by denying her request that the jury be instructed on the defense of "mere presence" under CJI2d 8.5, which provides:

> Even if the defendant knew that the alleged crime was planned or was being committed, the mere fact that [he/she] was present when it was committed is not enough to prove that [he/she] assisted in committing it.

The court ruled that CJI2d 8.5 applied only to prosecutions under an aiding and abetting theory and that the concept of "mere presence" was adequately covered by the possession instruction. The court instructed the jury, consistent with CJI2d 12.7, as follows:

> Possession does not necessarily mean ownership, possession means either that the person has actual physical control of the substance, as I do the pen that I am now holding [indicating], or that the person has the right to control the substance even though it is in a different room or place. Possession may be sole,

> where one person alone possesses the substance, or possession may be joint, where two or more people each share possession. *It is not enough that the defendant merely knew about the substance*, the defendant possessed the substance only if she had control of it, or the right to control it, either alone or together with someone else. [Emphasis added.]

We review this claim of instructional error de novo. *People v Bartlett*, 231 Mich App 139, 143; 585 NW2d 341 (1998). A trial court's instructions must include all the elements of the charged offenses and "must not omit material issues, defenses, and theories if the evidence supports them." *Id.* "Even if somewhat imperfect, instructions do not create error if they fairly present to the jury the issues tried and sufficiently protect the defendant's rights." *Id.* at 143-144. We find no error. First, the placement of CJI2d 8.5 in the jury instructions within the aiding and abetting chapter and its specific language indicate that the instruction applies to defendants accused of assisting another person – that is, aiding and abetting, which was not at issue here.[3] Second, the instruction given by the court, which included definitions of constructive possession and intent, sufficiently instructed the jury on the applicable law, incorporating the central thrust of the "mere presence" instruction. Under these circumstances, reversal is unwarranted.

Affirmed.

/s/ Patrick M. Meter
/s/ Kathleen Jansen
/s/ Michael J. Talbot

[3] The state's theory was that defendant was the principal in the charged offenses.